IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.817 OF 1989

Suwarna w/o Deendayal Soni,]
age 20 years, Occ.Household]
R/o.Kathada, Nasik at present] Appellant
lodged in Nasik Central Jail,] (Org.Accused)
Nasik.]

versus

State of Maharashtra] Respondent.

Mr.C.G.Gavnekar for the appellant/accused.
Dr.F.R.Shaikh, APP, for the State.

CORAM : D.G.DESHPANDE
S.R.SATHE, JJ.
DATED : JANUARY 11, 2007.

JUDGMENT [PER D.G.DESHPANDE, J]

1. Heard Mr.Gavnekar, learned advocate appearing for the appellant/accused and Dr.Shaikh, learned APP appearing for the respondent/State.

2. Accused is a lady, convicted under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life by the 3rd Addl.Sessions Judge, Nasik. By this appeal, she has challenged her conviction.

3. The case, in brief, of the prosecution is that, this accused was the friend of deceased Sunita. Deceased Sunita was staying in their rented tenement situated in Awasti Chawl on Jail Road of Nashik Road. Sunita was living with her husband Shantaram Labhade. On 27.1.1989, this accused, being a friend of deceased Sunita, went to her house. She stayed with them, had supper with them and stayed in their house in that night. It is alleged by the prosecution that during night all three of them slept on one bed.

4. It is the case of the prosecution that during night time Sunita woke up and noticed that this accused and her husband were having physical intimacy. Sunita objected and told her husband that he should not have any such relations with the accused and, therefore, her husband got enraged and poured kerosene on the person of

Sunita while this accused caught Sunita with her both hands. Husband Shantaram brought burning chimany near and the clothes of Sunita caught fired. In the process, husband Shantaram and Sunita got burnt. Then shouts for help were there. The owner of chawl Mewaram Awasti rushed. The door was broke open by another tenant by name Shirsath. Husband Shantaram told that he would himself go to the police station and, accordingly he left the house. Then Mewaram went to the police station and lodged report at about 3.30 a.m. on 28.1.1989 as per narration made to him by Sunita, which was reduced into writing as station diary entry No.6. Sunita was taken to civil hospital by the police where her dying declaration was recorded by the Special Judicial Magistrate Mr.Bawiskar. Statement of Shantaram was also recorded by the SEM and, after Sunita was succumbed to the injuries, offence of murder was registered.

5. In the mean time, both Sunita and her husband Shantaram died in the hospital and, therefore, charge sheet was filed only against this accused.

6. During trial, the defence of accused was of total denial. According to her, she has been falsely implicated by Sunita. The trial Court, however, believed the dying declaration of Sunita and disbelieved the dying declaration given by her husband Shantaram and convicted the accused, as stated above. Hence this appeal.

7. Learned advocate Mr.Gavnekar, appearing for the accused, vehemently urged that firstly even if the prosecution story is accepted as it is, there is no evidence on record at all to show that this accused was having any kind of intimacy or illicit relations with deceased Shantaram, nor there was any evidence to show that this accused used to go to deceased Sunita and stay at her house along with her husband Shantaram. Mr.Gavnekar also contended that in the absence of any such evidence, it was most difficult to believe that there could be any kind of physical intimacy between the accused and Shantaram giving cause for Sunita to get enraged. He, therefore, contended that the accused, being a friend and having no kind of sexual relationship with Shantaram, had no reason, whatsoever, to take this kind of revenge by burning Sunita alive. He

also contended that if the prosecution itself had tendered on record two dying declarations, one given by Sunita and other given by her husband Shantaram, then there was no reason to disbelieve the dying declaration of Shantaram.

8. Further, according to Mr.Gavnekar, the story given by deceased Sunita in her dying declaration that accused caught her and Shantaram poured kerosene on her person and both of them set her on fire by a chimani, is totally false. Because if husband Shantaram wanted to kill his wife Sunita in this manner, he would have, at least, taken care to see that he does not receive any injury. In any case, the injuries to Shantaram would not have been to such an extent resulting in his immediate death in the hospital.

9. On the other hand, the learned APP tried to contend that there was no reason to disbelieve the dying declaration of Sunita. He, therefore, urged that there was no merit in this appeal.

10. We find it difficult to digest the case of prosecution. Admittedly, there is absolutely nothing on record to show or suggest, even

remote, that this accused had any illicit relation with Shantaram, nor there is any evidence to show that prior to the incident she repeatedly frequented the house of deceased Sunita or, that Shantaram or accused were having intimacy or close relationship.

11. Even from the statement of Sunita (Exhibit 20) i.e. the dying declaration, this accused went to her house on that day being a friend of Sunita at 5.00 p.m. They had food together. They slept together on cot. In such a situation, even if Sunita noticed that accused and Shantaram were having physical intimacy, the accused would not have gone to the extent of burning her friend Sunita in spur of moment, because the accused is not habitual criminal at all.

12. The proceedings before trial Court show that the prosecution has been not fair at all to the accused. It is not the job of prosecution to try only for the accused conviction, but it is their duty to place all the facts on record. However, the dying declaration of Shantaram even though it was recorded by the SEM was not brought

on record and proved. Similarly the post mortem report of Shantaram was also not placed on record and proved. These two documents are in the Miscellaneous File containing original police papers. The dying declaration of Shantaram shows that according to Shantaram on that night he was living with his wife and a lady guest i.e. the accused has come at 11.00 in the night. Shantaram, his wife and the guest were sleeping on one cot. At about 12 in the midnight, his wife Sunita raised suspicion upon him and her friend. Therefore, there was quarrel and his wife poured kerosene upon herself and also upon Shantaram and set her fire and then he also caught fired. This was an important piece of evidence collected during investigation and it was necessary for the prosecution as well as the court to get it on record and proved. Similarly the post mortem report of Shantaram shows that Shantaram had received 66% of burns.

13. Not producing and proving these two documents creates strong suspicion about prosecution and it has to be stated that the trial was not at all fair. Both the prosecution and trial court are to be blamed for this lapse.

14. For all these reasons, this appeal is required to be allowed and the accused is entitled to be acquitted. We, therefore, pass the following order :-

:ORDER:

The appeal is allowed.

Conviction of the accused under Section 302 r/w 34 of IPC is set aside. She is acquitted.

Accused is on bail. Her bail bond shall stand cancelled.

[D.G.DESHPANDE,J]

[S.R.SATHE, J]